It seems to me, therefore, the presence of the company before the court may become necessary in order to enable it to adjudicate upon and settle all the questions involved in the case effectively and completely. The court is empowered under Order 16 rule 11 of the Rules of the Supreme Court to order that the company be joined as a co-defendant. They may apply to be so joined as an intervener or the plaintiff may also apply by way of notice of motion to the court. The first-mentioned course appears to be more appropriate (see *Amon* v. *Rachael Tuck & Sons Ltd.*,[4] and *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.*[5]).

The next important issue is whether the plaintiff has a caveatable interest in the said lands. Section 323(1) of the Code states: —

"The persons and bodies at whose instance a private caveat may be entered are —

(a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;"

I do not think subsections (b) and (c) are applicable.

Now, the whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land. In the case of an agreement which is valueless as a transfer or burdening instrument but is good as a contract, the contractual right may be sufficient to give a person an "interest" in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat (see *Inter-Continental Mining Co. Sdn. Bhd.* v. *Societe Des Etains De Bayas Tudjuh*[6]). Thus, an agreement which is a sub-lease though not in a statutory form, is treated in equity as an agreement for a sub-lease and the lessee has a right in equity to a registrable interest in the land and therefore has a caveatable interest under the section, *supra*. In *Sing Lian Express Sdn. Bhd.* v. *Soh Kim Tee*,[7] where the respondent had given irrevocable proof of his willingness to purchase the land and offered to pay the deposit and a draft agreement was prepared, Syed Othman J. (as he then was) held that an option for the sale of the applicant's land to be exercised within a certain period gives the respondent a caveatable interest in the land.

In the present case, it is abundantly clear from the agreement executed between the plaintiff and the second defendant that apart from the plaintiff paying the major portion of the purchase price he was also given the sole and exclusive right to develop the said lands, to sub-divide and construct houses for sale and to share the profits with the second defendant. The agreement naturally involves sales of houses including the land to prospective buyers and issues of documents of title which will affect the registration, endorsement or entry on the register document of title thereto. I hold in the circumstances that the plaintiff has a caveatable interest in the said lands.

It is also urged that the plaintiff has no right to caveat the lands by virtue of section 6(1) of the Malay Reservations Enactment No. 63 (Kedah). The subsection states, *inter alia*, that where any reservation land under a document of title is held by a Malay, no right or interest therein shall vest in any person who is not a Malay, whether by transfer, sale in the execution of a decree, sale at the instance of a chargee or otherwise; subsection (2) states that any document or agreement purporting to vest in any person any right or interest contrary to the above shall be void. Section 9 allows the leasing of such land by a Malay to a person other than a Malay, etc. for a term not exceeding three years. That provision is also included in Schedule "A", third paragraph of the Enactment. In the second paragraph of the Schedule it is stated that all documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay, and if owned by a Siamese can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the Enactment allows reservation land to be charged to a non-Malay. The proper test to be applied is whether any dealing in reservation land is contrary to the provisions of subsection (2). If so, any such agreement purporting to vest in any person, any right or interest shall be void. Although the agreement between the plaintiff and the second defendant could be regarded as dealing in reservation land, it is not, in my view, one which is contrary to the provision of the Enactment (see *Foo Say Lee* v. *Ooi Heng Wai*[8]).

I therefore dismiss the two applications by the third defendant with costs.

Order accordingly.

Solicitors: *Darshan Singh & Co.; Wong, Chooi & Mohd. Nor.*

PUBLIC PROSECUTOR v. TEH CHENG POH

[O.C.J. (Gunn Chit Tuan J.) August 14, 15 & 16, 1979]

[Penang — Criminal Trial No. 15 of 1979]

Criminal Law and Procedure — Charges of possession of firearm and ammunition — Credibility of police witnesses — Discretion of prosecution in calling witnesses — Corroborative evidence — First information report not produced — Burden of proof in criminal case — Evidence Act, 1950, s. 114(g) — Internal Security Act, 1960, s. 57.

In this case the accused was retried pursuant to the order of the Federal Court. The accused was charged with two charges under the Internal Security Act, 1960, for possession of a revolver and possession of ammunition. At the trial the prosecution called only four witnesses, the main witness being a police officer in charge of a police patrol car. Thirteen other witnesses who had been subpoenaed by the prosecution were offered to the defence. It was argued that (a) that the police officer in charge of the police petrol car (PW2) was an unreliable and interested witness and that his evidence should not be accepted by the court; (b) that a number of witnesses who should have been called by the prosecution was not called to give evidence; (c) that the first information report was not produced (d) that the accused had rebutted the evidence for the prosecution.

Held: (1) the police officer in charge of the police patrol car (PW2) was not an interested witness but a public officer performing his duties. In the absence of contradiction or anything improbable in his evidence, he should be accepted as a witness of truth and as a reliable witness;

(2) the prosecution has a discretion in calling witnesses and in this case the presumption under section 114(g) of the Evidence Act, 1950, did not arise;

(3) PW2 in this case was not the complainant and the

failure to produce any report by him could not raise any presumption under section 114(g) of the Evidence Act, 1950;

(4) in this case the court could not believe or accept the accused's explanation and further it did not raise a reasonable doubt as to his guilt. The accused should therefore be convicted.

Cases referred to:-

(1) *Deraiya* v. *State of Coorg* A.I.R. 1956 Mysore 51, 53.
(2) *Public Prosecutor* v. *Mohamed Ali* [1962] M.L.J. 257, 258.
(3) *Balasingam* v. *Public Prosecutor* [1959] M.L.J. 193.
(4) *Khoo Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105, 109.
(5) *Samsudin* v. *Public Prosecutor* [1962] M.L.J. 405, 407.
(6) *Tan Cheng Kooi* v. *Public Prosecutor* [1972] 2 M.L.J. 115.
(7) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263, 264.
(8) *Tan Thian Peng* v. *Public Prosecutor* [Kedah Criminal Trial No. 12 of 1976; Federal Court Criminal Appeal No. 5 of 1977.]

CRIMINAL TRIAL.

Hashim bin Datuk Haji Yusoff (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh for the accused.

Gunn Chit Tuan J.: On April 27, 1979, the Federal Court* ordered a new trial for the above-named accused. The Public Prosecutor decided to charge him once again under the Internal Security Act, 1960 (Revised — 1972) and the following two charges were preferred against him on June 9, 1979:—

"First Charge

That you on the 13th day of January 1976 at about 12.35 p.m. at the junction of Kampar Road and Ayer Itam Road in the district of George Town, in the State of Penang, did without lawful excuse, in a security area, proclaimed by the Yang Di-Pertuan Agong vide Federal Gazette P.U.(A) 148 dated 15th May, 1969 have in your possession firearm, to wit, a home-made .38 Revolver, without lawful authority therefore, and that you have thereby committed an offence punishable under section 57(1)(a) of the Internal Security Act No. 82 (Revised 1972).

Second Charge

That you on the 13th day of January 1976 at about 12.35 p.m. at the junction of Kampar Road and Ayer Itam Road in the district of George Town, in the State of Penang, did without lawful excuse, in a security area, proclaimed by the Yang Di-Pertuan Agong vide Federal Gazette P.U.(A) 148 dated 15th May, 1969, have in your possession ammunitions, to wit, 5 rounds of .38 Special Revolver bullets, without lawful authority therefore, and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act No. 82 (Revised 1972)."

When he was brought before the Magistrate's Court on June 9, 1979 he was committed for trial in the High Court, Penang, and was subsequently charged and tried before me on August 14, 1979.

The facts of this case, as disclosed by the evidence adduced, are simple. As a result of an emergency call received by Cpl. 11950 (PW1), who was on duty at the emergency desk in the Central Police Station, Penang, two police patrol cars on rounds were instructed to go to No. 26 Lim Lean Teng Road, Penang, where it was alleged that a robbery had taken place. One of the police patrol cars which went to No. 26 Lim Lean Teng Road was called 'Whisky 18' and Cpl. Haji Mohd. bin Chu (PW2) was in charge of it. The prosecution called only four witnesses and PW2 was the main witness. As learned counsel for the defence in his submission has contended that this witness was an unreliable and interested witness and that the court could not accept his evidence, it is therefore necessary for me to set out his evidence here in some detail. He (PW2) said that he was in charge of 'Whisky 18' when he received instructions to proceed to No. 26 Lim Lean Teng Road. He proceeded there and met a male Indian called Subramaniam s/o Ramasamy and a male Chinese called Quek Kwang Hun. He was told by them that the robber concerned wore a green shirt with long sleeves and a red crash helmet. The said male Chinese also told him that he could identify the robber who had left in the direction of Kampar Road. He then proceeded towards Kampar Road together with the said Subramaniam and Quek in his police car and on arrival at the junction of Kampar Road and Ayer Itam Road Subramaniam and Quek spotted the robber concerned. He then got out of his car and together with his police driver, P.C. 25654, went towards a male Chinese whom he identified as the accused. As he approached the accused he asked him to stop and raise his hands. The accused complied with his instructions and the police driver went towards his left whilst he went towards his right. They arrested him and recovered a pistol which was tucked in his waist. The pistol was produced in court and marked P2 whilst five rounds of ammunition found in it were also produced and marked P3A-E. The accused was later handed over to Ag. A.S.P. Ku Yahaya (PW3) together with the said pistol and ammunition. Under cross-examination this witness said that the accused did not see them approaching and that he only saw them when he shouted "Stop and raise up your hands". At one stage of his cross-examination PW2 was asked whether he remembered giving evidence in the High Court on another occasion and when asked by defence counsel whether he had said in the previous trial that the accused ignored his challenge, he said and demonstrated how he had to challenge the accused twice. However, apart from this alleged inconsistency which PW2 was able to explain, I found that he was not discredited at all and I accepted him as a witness of truth.

Acting A.S.P. Ku Yahaya (PW3) confirmed that PW2 handed over the accused to him at 2.30 p.m. on the relevant date and also handed over to him the said pistol (P2) and the five rounds of ammunition (P3A-E) which he identified in court.

After the close of the case for the prosecution, the learned deputy made available to the defence thirteen witnesses who had been subpoenaed by the prosecution and learned defence counsel indicated that he might require the said Quek Kwang Hun, Subramaniam s/o Ramasamy and P.C. (now Cpl.) 25654.

The accused elected to give evidence on oath and said that he was arrested at the junction of Kampar Road and Ayer Itam Road on January 13, 1976. He was returning from the city on a bus and had got down at a bus stop. He was walking home when he heard someone shouting. He could not make out what the shouting was about and stopped. He then saw PW2 approaching him and PW2 on reaching him struck him with a sterling gun. He was then searched but nothing was found on him. He said that it was not true that there was a pistol tucked on his waist. He also said that it was not true that five rounds of ammunition were recovered from him. He was taken

* See [1979] 2 M.L.J. 238.

to the police station where he was not shown either the pistol marked P2 or any other gun. He was assaulted and asked to admit possession of the gun and ammunition. He did not admit possession of any firearm or bullets and was later charged in court.

Under cross-examination the accused said that he had not seen PW2 before his arrest and agreed that the latter would have no grudge against him. When challenged, he denied that he had a pistol that day and said that he was assaulted. When asked why he did not make a police report regarding the alleged assault he said in reply "How could I make a report?". When asked again whether he had made any report since that day, his answer was that he had made a complaint during the previous trial.

In his submission, Mr. Karpal Singh, counsel for the accused, contended that PW2 was an unreliable and interested witness whose evidence should not be accepted by the court. He also pointed out that the driver of the police car, that is P.C. (now Cpl. 25654), and the said Subramaniam and Quek Kwang Hun were not called as witnesses by the prosecution and, having referred to the following passage in the Indian case of *Devaiya* v. *State of Coorg*[1]: —

"The Indian Evidence Act does not provide that any particular number of witnesses should be examined in proof of any fact and therefore a conviction can be based even on the solitary testimony of a single witness provided that witness is believed by the court.

This principle will generally hold good when the fact to which he deposes is not within the knowledge of any one else or when the incident or the occurrence is not witnessed by anybody else.

But when there are others equally respectable and disinterested who have witnessed the occurrence, which is in issue, and when those witnesses or at least some of them are not examined in corroboration of the evidence of the other witness and no explanation is offered for their non-examination, generally it is unsafe to rely on the uncorroborated testimony of a single witness in a case of this type where the liberty of the subject is at stake.

The non-examination of the other material witnesses, though available, will very much weaken the evidence of the single witness, however respectable he may be,"

Counsel contended that it was therefore unsafe to rely only on the testimony of PW2. Mr. Karpal Singh also referred to the following passage appearing on page 390 of the Indian Quinquennial Digest 1971 — 1975 (Volume 3) concerning the credibility of a Police witness:—

"Section 3 — Police witness — Credibility of. The mere circumstance that the witnesses were Police Employees may not be sufficient for doubting their veracity but when the accused was wanted by the Police in a murder case and when passing on a road he was apprehended and on search of his person was found to be in possession of a pistol, live cartridge etc., the official position of such police witnesses does demand strict scrutiny and corroboration of their statements. 1973(1) Chand LR 620."

Section 3 referred to in the above passage is a reference to section 3 of the Indian Evidence Act (1872). I was not referred to the provisions of that section and, as far as I am aware, it is the interpretation clause of the said Act. Be that as it may, although I would agree that the evidence of any witness should of course be scrutinised with care, I would not, with respect, subscribe to any proposition that the evidence of a police witness must invariably be corroborated in the circumstances described in the above-mentioned passage. I would however, with respect, refer to and adopt the following dictum of Thomson C.J. (as he then was) in the case of *Public Prosecutor* v. *Mohamed Ali*[2] when his Lordship said as follows:—

"When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, should normally be accepted."

Here I would reiterate that I had, of course without undue emphasis on demeanour alone, after seeing and hearing PW2 in the witness box, found him to be a witness of truth and had accepted his testimony as reliable. I also considered that he was not an interested witness but was only a public officer who was only performing his duties and merely related to the court what he actually saw and did on that day. His evidence was not contradicted by other evidence nor was he shaken in cross-examination and I also found that there was nothing inherently improbable about his evidence which was given on oath. Even if PW2 was an interested witness there is no legal presumption that he should not be believed unless there are cogent reasons for disbelief in the light of evidence to the contrary and the surrounding circumstances (*Balasingam* v. *Public Prosecutor*[3]). There were no such cogent reasons or evidence to the contrary and the surrounding circumstances in this case do not show that PW2 should be disbelieved. As regards the complaint that the prosecution had not called the police driver or the other two civilian witnesses, I could not but agree with learned counsel that although he was not insinuating that the learned deputy was inexperienced or careless, yet the prosecution could have strengthened its case by calling one or two of them. But here we need only refer to the case of *Khoon Chye Hin* v. *Public Prosecutor*[4] in which our former Court of Appeal had reviewed all the leading authorities and came to the conclusion that the calling of witnesses was a matter for the discretion of the prosecution. Again the said Court of Appeal had also made the following observations in the case of *Samsudin* v. *Public Prosecutor*[5]:—

"It is clear from these authorities that the prosecutor has a discretion and also that if he does not call material witnesses who are available he runs the risk of having the presumption in illustration (g) to section 114 of the Evidence Ordinance raised against him. In the present case there was no attempt at concealment, no suggestion, as said by Lord Thankerton in the case of *Adel Muhammed El Dabbah* v. *Attorney-General for Palestine* (1944) A.C. 156, 168) 'that the prosecutor has been influenced by some oblique motive'. The witnesses were freely offered to the defence and in our opinion the presumption did not arise."

In the present case, there was also no attempt at concealment and no evidence that there was any oblique motive on the part of the learned deputy. The said three witnesses were not deliberately kept back and having been subpoenaed to court by the prosecution were freely offered to the defence which

even indicated that it might require them. I therefore also held that in the circumstances of this case the presumption under the said section 114(g) of the Evidence Act, 1950 did not arise. I would add that it is also provided under section 134 of our Evidence Act, 1950, that no particular number of witnesses shall in any case be required for the proof of any fact. But, if corroborative evidence was required, it will be observed that PW2 did recover from the accused the said pistol (Exhibit P2) and the five rounds of ammunition (Exhibit P3A-E) which he handed over to PW3 who in turn produced them in court. This confirmed some material particulars of PW2's testimony and neither PW2 nor PW3 were challenged in cross-examination to dispute the fact that the pistol and ammunition in question were recovered from the accused that day.

Counsel also referred to the case of *Tan Cheng Kooi & Anor.* v. *Public Prosecutor*[6] in which it was held *inter-alia* by Chang Min Tat J. (as he then was) that where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine his accuser, and which would raise the presumption under section 114(g) of the Evidence Act, 1950 that the report would be unfavourable to the prosecution case. His Lordship, therefore, held that as the evidence against the appellants in that case came entirely from the complainant, the conviction of the accused could not be upheld. In this case, Mr. Karpal Singh argued that PW2 was the complainant and that his first information report should have been produced. With respect, I was of the view that strictly speaking the person who could be considered the complainant in this case was not PW2, but Cpl. 11950 (PW1) who, having received the emergency call from a male Chinese who did not give his name, then made the first information report. Moreover, in this case the prosecution did not depend entirely on the evidence of PW2, who was not the complainant, and the failure to produce any report by him, if there was one, could not also in my judgment raise any presumption under the said section 114(g) of the Evidence Act, 1950.

Finally, counsel referred to the judgment of Suffian J. (as he then was) in the case of *Mat* v. *Public Prosecutor*[7] where His Lordship had explained the meaning of the burden of proof by an accused person in cases where it is necessary for him to rebut the prosecution case against him. His Lordship in that case said as follows:—

"If you accept the explanation given by or on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

The position may be conveniently stated as follows:—

(a) If you are satisfied beyond reasonable doubt as to the accused's guilt.	Convict.
(b) If you accept or believe the accused's explanation.	Acquit
(c) If you do not accept or believe the accused's explanation.	Do not convict but consider the next steps below.
(d) If you do not accept or believe the accused's explanation and that explanation does not raise in your mind a reasonable doubt as to his guilt.	Convict.
(e) If you do not accept or believe the accused's explanation but nevertheless it raises in your mind a reasonable doubt as to his guilt.	Acquit."

In this case I did not accept the accused's explanation because I could not believe his evidence that PW2 struck him with his sterling gun when he first approached him. He did not make any report about the alleged assault and when asked by the learned deputy if he had made any report since that day, I noticed that he avoided giving a direct answer to that question and merely said that he had made a complaint during the previous trial. In any case, I was satisfied that PW2 whom the accused admitted had no grudge against him, has told the court the truth about what he saw and did that day. On the other hand, I did not believe the accused when he said that nothing was found on him when he was searched by PW2 because, here again, PW2 could not have produced a pistol and five rounds of ammunition to PW3 if he had not in fact recovered them from the accused. There was also no suggestion that the gun and ammunition in question might have been recovered from someone else. Although I did not believe or accept the accused's explanation, I also found that it did not raise a reasonable doubt in my mind as to his guilt. Applying the abovementioned tests laid down in the said case of *Mat v. Public Prosecutor*[7] and in accordance with Regulation 17 of the Essential (Security Cases) (Amendment) Regulations, 1975, the court, having considered and given all due weight to the evidence of both the prosecution and the defence as a whole as well as to the submissions of both counsel, found the accused guilty of both charges against him. The court therefore convicted him on both the said charges.

Although under section 57(1) of the said Internal Security Act, 1960 (Revised — 1972) any person convicted of an offence under the said section shall be punished with death, yet before the court passed sentence of death on the accused, Mr. Karpal Singh referred me to the judgment of Datuk Syed Agil J. in Kedah Criminal Trial No. 12/76 (Federal Court Criminal Appeal No. 5/77 — *Tan Thian Peng* v. *Public Prosecutor*) wherein his Lordship had suggested that the said appellant's case might be reviewed in his favour provided his desire to return to the fold and be a law-abiding citizen was honest and sincere. Counsel therefore asked the court in this case to consider recommending mercy too on the grounds that Acting A.S.P. Ku Yahaya bin Kamaruddin (PW3) has stated under cross-examination that as far as he was aware there was no political subversion involved in this case. I informed counsel that I had taken note of his plea which I would mention in my report under section 281 of the Criminal Procedure Code (F.M.S. Cap. 6) for consideration by the appropriate authorities in due course.

Accused convicted.

Solicitors: *Karpal Singh & Co.*